

No. 2798.

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United States  
**Circuit Court of Appeals**

FOR THE NINTH CIRCUIT.

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T. F. Turner.

*Appellant.*

*vs.*

Kate J. Wells and Ironsides Reduction and Leasing Company,  
a corporation,

*Appellees.*

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REPLY BRIEF OF APPELLANT.

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**Filed**

OCT 5 - 1916

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## REPLY BRIEF OF APPELLANT.

Counsel for appellees rely upon section 1881, Code of Civil Procedure of California, as a ground for the exclusion of the written declarations of A. W. Wells. This section is copied in full on page four (4) of appellees' brief.

Wells was not offered as a witness, and consequently not "examined," and the code merely declares that either of the spouses cannot be "examined" in an action or proceeding against the other, but does not render their statements elsewhere given privileged against

being shown by competent testimony, plaintiff is not precluded from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them.

Section 1322 of the Penal Code of California provides *inter alia*:

“Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties except with the consent of both \* \* \*.”

The Supreme Court, in construing these two sections, 1881 of the Code of Civil Procedure and 1322 of the Penal Code, has said:

“The provisions of the code (Code Civ. Proc., Sec. 1881 (1); Penal Code, Sec. 1322) prohibiting a husband or a wife from being examined as a witness for or against the other, except with the consent of both, does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them. The code merely makes either spouse incompetent as a *witness* in an action or proceeding against the other but does not render their statements elsewhere given privileged against being shown by competent testimony.”

People v. Chadwick, 87 Pac. 384, 389 (followed in *People v. Swaile*, 12 Cal. App. 192, 195).

In 4 Jones' Commentaries on Evidence, Sec. 746, in discussing section 1881 of the California Code of Civil Procedure, in note 69, the writer says:

“In California it has been held that neither the provisions of section 1881 of the Code of Civil Procedure, relating to privileged communications between husband and wife, nor those of section 1322 of the Penal Code rendering the wife incompetent to testify against her husband in a criminal case, were violated by the introduction in evidence of a letter written by the husband to the wife.  
\* \* \*”

People v. Swaile, 12 Cal. App. 192, 195, 107 Pac. 134 (following People v. Chadwick, 87 Pac. 384, 389).

In that case the court said:

“The statement introduced by the letter is that of the husband, and there was no examination of the wife as to a privileged communication, nor was she examined as a witness against her husband.”

People v. Swaile, 12 Cal. App. 192, 195;  
People v. Chadwick, 4 Cal. App. 63, 72;  
4 Jones' Commentaries on Evidence, Sec. 746,  
n. 69, p. 474.

“While the problem here considered is a matter of first impression in California, this court declared years ago in favor of the liberal construction of section 1322 of the Penal Code and the admission of testimony not clearly excluded by its terms.”

People v. Loper, 159 Cal. 13.

In *People v. Langtree*, decided in 1883, the court in bank adopted with approval the following language of Mr. Schouler:



“On the whole, the prevailing tendency of late years in both England and America is to regard the domestic confidence or the ties of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth in all cases; such facilities being increased, it is believed, by hearing what each one has to say, and then making due allowance for circumstances affecting each one’s credibility.”

People v. Langtree, 64 Cal. 256, 30 Pac. 813;

People v. Loper, 159 Cal. 13, 14;

Schouler on Husband and Wife, 85.

“It will be noticed that, construing section 1322 of the Penal Code and section 1881 of the Code of Civil Procedure together, the inhibition of testimony extends to communications made by one to the other. Mental condition is not a matter of communication and in view of the broad rule adopted in *People v. Langtree*, we are constrained to hold that the testimony of this witness was admissible.”

People v. Loper, 159 Cal. 14.

In general, the rules of evidence are the same in civil and criminal cases.

U. S. v. Gooding, 12 Wheat. 469;

Nudd v. Burrows, 91 U. S. 289.

The trial court took this view of the construction of this statute and admitted the declarations of Wells.

It is unnecessary to comment on any of the authorities cited by appellees as they are not applicable in the face of an absolute determination of the construction to be placed upon section 1881, Code of Civil Procedure of California.

But for a greater reason should the declarations of A. W. Wells be admitted, being as they are “on the foot of the fraud” and this *ex necessitate rei*.

“Any communication between husband and wife while they are engaged in the perpetration of a fraud are not privileged, but may be given in evidence. Thus, in an action against a husband and wife to set aside a fraudulent conveyance from the former to the latter, the negotiations between them prior to the conveyance relative to the consideration are admissible in evidence.”

Beitman v. Hopkins, 109 Ind. 177.

“In Henry v. Sneed (99 Mo. 407) it was decided that ‘In a suit to enjoin the enforcement of a deed of trust securing upon the wife’s land certain notes given by the husband in a transaction for the sale of property induced by fraud, the husband may testify as to conversations had with the tort feasers, and the husband and wife may testify as to conversations between themselves as to the transactions, as part of the *res gestae*, and also on the ground of fraud, and this *ex necessitate rei*. And the party who uses a husband as a mere conduit to convey his fraudulent schemes to the ears of a wife will not be allowed, when the conversations thus induced between husband and wife are offered in evidence in order more fully to unearth his fraud, to interpose the technical objection that, being conversations between husband and wife, they are therefore inadmissible.’ In addition, the court said: ‘In the present case, Sneed attempted to take advantage of a legal technicality as to conversations between husband and wife, to prevent the full extent of his fraud

from being unearthed. Now, in view of the other facts in evidence, it would be simply monstrous to permit a party to take advantage of his own wrong, and assist his own fraud by such an objection. The rule he invokes as to confidential communications between husband and wife was intended to subserve a very wise, wholesome, and holy purpose, but never to further such an end as that for which he invokes it. And this exception to a general rule should certainly have place in a court of equity, which will throttle fraud in all its protean manifestations. We will therefore rule that the testimony of both husband and wife was, *ex necessitate*, competent as to their conversations on two grounds: that those conversations were a part of the *res gestae*, and on the foot of the fraud.'

"A communication made by a husband to his wife respecting trust property which it is their joint duty to carefully preserve and surrender to the owner when lawfully entitled to it is not confidential, within the meaning of the law relieving husband and wife from any obligation to disclose any confidential communication made by one to the other during marriage."

Wood v. Chetwood, 27 N. J. Eq. 311;

Commonwealth v. Sapp, 29 Am. St. Rep. 422-3.

We do not believe that appellees have answered our argument, and insist that the decree should be in favor of appellant.

Respectfully submitted,

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